

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Michael D. Johnson,
Complainant,

vs.

Nancy Levitz, formerly known as Nancy
Havelish, and the Levitz for City Council
Campaign,

Respondents.

ORDER ON MOTION FOR
RECONSIDERATION

This campaign complaint matter was heard on January 19, 2005, before a panel of three Administrative Law Judges. On February 8, 2005, the panel issued its decision. The panel found that Respondents prepared and distributed false campaign material in violation of Minnesota Statutes § 211B.06, subd. 1, and ordered Respondents to pay a civil penalty of \$4,800.

On February 18, 2005, Respondent Nancy Levitz filed a motion for reconsideration. On February 22, 2005, Complainant filed a response, and the record with respect to this motion closed on that date.

Respondent Nancy Levitz, 10155 119th St. North, Grant, MN 55082, represented herself. Jay Benanav, Esq. of the firm of Weinblatt & Gaylord, 111 E. Kellogg Blvd., Suite 300, St. Paul, MN 55101, represented the Complainant, Michael Johnson.

Based upon the record herein, and for the reasons stated in the following Memorandum,

IT IS ORDERED:

1. That Respondent's motion for reconsideration is DENIED.
2. That Complainant's request for attorney's fees is DENIED.

Dated: February 28, 2005

s/Allan W. Klein

ALLAN W. KLEIN

Administrative Law Judge

s/George A. Beck

GEORGE A. BECK

Administrative Law Judge

s/Barbara L. Neilson

BARBARA L. NEILSON

Administrative Law Judge

MEMORANDUM

The panel of three Administrative Law Judges issued its final decision in this matter after the hearing record closed on January 31, 2005. Minn. Stat. § 211B.36, subd. 1, provides that the panel may consider any evidence and argument submitted until a hearing record is closed. Respondent Levitz has now brought a motion for reconsideration of the panel's decision based on what she contends is newly obtained evidence. Pursuant to Minn. Stat. § 211B.36, subd. 5, a party aggrieved by the final decision on a campaign complaint is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63 to 14.69. However, campaign complaints are not contested cases within the meaning of chapter 14 and are not otherwise governed by chapter 14.^[1]

Minnesota Statutes §§ 14.63 to 14.69 govern the process for instituting judicial review by the Court of Appeals of a final contested case decision. Minn. Stat. § 14.67 specifically permits a party to make a motion to the Court of Appeals to present additional evidence on the issues in the case, which the court may grant if it is shown that the additional evidence is material and that there were good reasons for a party's failure to present it. Although requests for reconsideration are mentioned in section 14.64, it is only with respect to their effect on tolling the time for appeal to the Court of Appeals. After reviewing the governing statutes, the panel concludes that a right to reconsideration of the decision *by the panel* is not provided for in chapter 211B.^[2] Instead, the only option for aggrieved parties is to seek judicial review of the decision from the Minnesota Court of Appeals. Requests, such as Levitz's, to present additional evidence and to modify the findings will be considered by the Court of Appeals under Minn. Stat. § 14.67. Therefore, Levitz's option is to appeal the decision and address her motion to the Court of Appeals.

Even if the panel were to determine that it could consider Respondent's motion for reconsideration, the motion would be denied. Pursuant to Minn. Stat. § 14.67, Levitz must show that the additional evidence is material and that there were good reasons for her failure to present it at the hearing. In addition, OAH rules require that on motions for reconsideration material evidence be newly discovered and of the type that with reasonable diligence could not have been found and produced at the hearing.^[3] The Respondent's evidence does not meet this standard. Even assuming that the proposed evidence is material, Respondent has failed to put forward any explanation as to why the evidence is newly discovered and could not have been found or produced at the hearing.

First, the Respondent seeks to introduce a videotape of a July 27, 2004, Grant City Council public information meeting, which Respondent contends the Complainant presented at the hearing but never played. The tape apparently covers discussions relating to the proposed utility franchise fee, the building for the city's new grader, and the possible purchase of a fire truck. Contrary to Respondent's claim, the Complainant did not present this videotape at the hearing. Instead, the Complainant identified as potential exhibit, but ultimately did not offer into evidence, a videotape of a November 16, 2004 meeting of the Hugo City Council. More important, however, Respondent fails to explain why she could not have produced this videotape at the hearing. She was clearly aware of the July 27th meeting because she states that she attended it along with

several hundred other residents. Because Respondent has not presented good reasons for her failure to present this evidence at the hearing, her motion for reconsideration based on the additional evidence contained in the videotape is denied.

Respondent has also submitted copies of her neighbors' electric bills to demonstrate that, at least for some people, the \$2.35 flat fee amounted to 5 percent or more of their monthly utility bill. Again, this evidence is not newly discovered. Respondent could have easily gathered this information from her neighbors prior to the hearing. Moreover, its materiality is doubtful. Because Respondent has not presented good reasons for her failure to present this evidence at the hearing, her motion for reconsideration based on her neighbors' utility bills is denied.

Respondent has also submitted a document entitled "Finance Committee budget discussion items," which lists a number of budgetary items including "2005 spending on fire substation" under the heading "Recommendation on Capital Spending." Respondent maintains that the City scheduled a budget workshop meeting on August 31, 2004, and that this document was the written agenda of the items to be discussed at the meeting. Respondent argues that since "spending on fire substation" was listed as a discussion item, the document demonstrates that the City planned to build a fire station. The document is not on City letterhead and appears to be a draft, given that there are more numbers listed than discussion items. But even if foundation could be established for the document, Respondent again has not offered any explanation as to why this information could not have been found and produced at the hearing. Because Respondent has not presented good reasons for her failure to present this evidence at the hearing, her motion for reconsideration based on this document is denied.

Finally, Respondent has submitted handwritten notes of the August 31, 2004, budget workshop meeting. Respondent does not identify who wrote the notes, nor does she explain why these notes could not have been produced at the hearing. Because Respondent has not presented good reasons for her failure to present this evidence at the hearing, her motion for reconsideration based on these notes is denied.

Complainant has requested reimbursement of his attorney's fees incurred in replying to Respondent's motion based on Minn. Stat. § 211B.36, subd. 3. This provision, however, is not applicable. It only permits the panel to order a Complainant to pay the Respondent's reasonable attorney's fees and costs of the Office of Administrative Hearings if the panel determines the complaint was frivolous. There is no other provision in chapter 211B that explicitly provides for awarding attorney's fees. In addition, the panel does not find Respondent's request for reconsideration to have been frivolous or brought in bad faith. Therefore, Complainant's request for attorney's fees is denied.

A.W.K., G.A.B., B.L.N.

^[1] Minn. Stat. § 211B.36, subd. 5.

^[2] Minn. Stat. § 211B.34, subd. 3, specifically provides for reconsideration by the Chief Administrative Law Judge of probable cause determinations.

^[3] Minn. Rule 1400.8300.